

**JEANNIE NIEGISH**  
Claimant

**DIAMOND COACH CORPORATION**  
Respondent

**U. S. F. & G.**  
Insurance Carrier

## ORDER

## APPEARANCES

## RECORD AND STIPULATIONS

## ISSUES

This is a claim for a September 19, 1995 accident and resulting injury to claimant's neck and low back. After finding that claimant's neck problems were not related to the September 1995 accident, Judge Frobish awarded claimant a five percent permanent partial general disability for the injury and functional impairment that claimant sustained to the low back.

Claimant contends the Judge erred. She argues that she injured both her low back and neck in the accident.

Conversely, respondent and its insurance carrier contend that Ms. Niegisch completely recovered from the low back injury that she sustained in the accident and that her neck was not injured at all. Alternatively, they argue that the Judge failed to deduct an amount for the low back impairment that preexisted the accident.

The only issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. If claimant sustained permanent injury in the accident, should the award be reduced for preexisting low back impairment?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds:

1. On September 19, 1995, Ms. Niegisch fell at work as she was stepping from a bus that she had been working in. The accident caused Ms. Niegisch to hit her low back on the edge of a step.
2. The parties stipulated that the accident arose out of and in the course of Ms. Niegisch's employment with Diamond Coach. Diamond Coach and its insurance carrier admit that Ms. Niegisch injured her low back in the accident but deny that she injured her neck.
3. After the accident, Ms. Niegisch went by ambulance to the Labette County Medical Center where she was hospitalized for several days and saw Dr. C. H. Farley. Initially, Ms. Niegisch's primary complaint was low back pain.
4. After being released from the hospital, Ms. Niegisch consulted with Parsons' orthopedic surgeon Dr. William L. Dillon and then began treating with Pittsburg's Dr. Kevin Komes, who is board certified in physical medicine and rehabilitation, for her low back symptoms.
5. Although he does not consider himself to be the company doctor, Dr. Komes sees a "fair number" of Diamond Coach's injured workers. Dr. Komes began treating Ms. Niegisch on October 18, 1995, and initially diagnosed right iliac rotation. On November 9, 1995, approximately seven weeks after the accident, Ms. Niegisch told the doctor she had slipped at work the day before and had pain in both buttocks that radiated up the back

towards the right shoulder along with neck discomfort. Dr. Komes did not treat the neck symptoms as Ms. Niegisch did not mention them again.

6. On October 23, 1995, Dr. Komes released Ms. Niegisch to work light duty for four hours per day. On November 7, 1995, the doctor permitted her to work light duty six hours per day. On December 1, 1995, the doctor believed Ms. Niegisch's low back symptoms were resolving and he released her to return to work without restrictions. According to Nancy Newby, Diamond's human resource manager, in December 1995 Ms. Niegisch returned to her job and ten-hour workdays.

7. Ms. Niegisch last worked for Diamond Coach on January 22, 1996. When she awoke that morning, Ms. Niegisch's neck felt like she had slept on it wrong. On her way to work she stopped to put gas in her van and her neck symptoms increased. She arrived at work at 5:00 a.m. But because others were late, she did not begin working until an hour later. Around 6:00 a.m. she experienced a sharp pain in her neck while pulling up her jeans after using the bathroom. After that incident, she told her supervisor she was having problems and she went home.

8. At the regular hearing, Ms. Niegisch testified that she began noticing pain in her neck in November 1995 while in physical therapy. She believes her neck became symptomatic because of the lifting she did in the physical therapy program that Dr. Komes prescribed for her low back. But at the time of the incident in January 1996, Ms. Niegisch told Diamond's plant manager, George Reeves, and the human resource manager, Nancy Newby, that her neck was stiff because she had slept on it wrong. Additionally, when Ms. Newby offered to refer her back to Dr. Komes, Ms. Niegisch refused, stating her neck symptoms were not work-related.

9. After leaving work because of neck pain, Ms. Niegisch returned to Dr. Farley. The doctor's notes dated January 22, 1996, indicate that Ms. Niegisch told him that her neck felt like she had slept on it wrong. Dr. Farley again referred Ms. Niegisch to Dr. Dillon who then referred her to orthopedic surgeon Dr. Glenn M. Amundson at the KU Medical Center for a second opinion for her neck.

10. Dr. Amundson treated Ms. Niegisch from June 1997 through April 1998. Ms. Niegisch told the doctor that she awoke one day in January 1996 with a stiff neck and pain that worsened throughout the day. After examining the results of an MRI that he had requested, the doctor diagnosed mild spinal stenosis at the C3-4 level, significant disc herniation and tightness at both the C4-5 and C5-6 levels.

11. After leaving in January 1996, Ms. Niegisch did not return to work at Diamond Coach. The company terminated her in February 1996 when she did not immediately

return to work after Dr. Farley's off-work slip expired and she indicated she needed additional medical leave for her neck problems.

12. In April 1997, Ms. Niegisch worked for approximately two weeks at a Sirloin Stockade for \$4.75 per hour. She left that job because she was hurting so badly that she could not continue working. She then worked for an unspecified period babysitting for a neighbor for \$50 per week. That job ended when she was no longer needed.

13. When she testified at the regular hearing in July 1997, Ms. Niegisch was unemployed although she was then working with a vocational rehabilitation counselor, Monty Longacre, in trying to find a job.

14. At the regular hearing, Ms. Niegisch testified that she had recently on several occasions been awakened at night by pain running down her shoulder into the back of her arm and into her hand. Three months after testifying at that hearing, Ms. Niegisch had neck surgery. Ms. Niegisch did not testify again.

15. In September 1997, Dr. Amundson recommended discectomy and a two-level fusion from C4 through C6, which was performed in late October 1997.

16. Before the September 1995 accident, Ms. Niegisch had experienced low back symptoms and had been told she had arthritis in her low back. On at least three occasions before September 1995, Ms. Niegisch had sought low back treatment – November 1992; September 1993; and February 1995.

17. Dr. Komes testified on behalf of Diamond Coach and its insurance carrier. He believes that Ms. Niegisch probably had a five percent whole body functional impairment for the low back before the September 1995 work-related accident. He does not believe that Ms. Niegisch sustained any permanent injury or impairment as a result of that injury as he attributes all of the structural abnormalities in her back to her preexisting condition. He saw Ms. Niegisch in January 1996 to rate her functional impairment. According to the doctor, Ms. Niegisch had full range of motion in her lumbar spine and displayed no evidence of permanent impairment according to either the third or fourth editions of the AMA Guides to the Evaluation of Permanent Impairment (Guides). Therefore, according to Dr. Komes, Ms. Niegisch has no restrictions and no task loss because of the September 1995 accident.

18. Ms. Niegisch's attorney referred her to board certified orthopedic surgeon Dr. William D. Smith of Bartlesville, Oklahoma. Dr. Smith saw Ms. Niegisch both before and after her neck surgery as he saw her in April 1996 and in April 1998. At his second deposition taken in September 1998, the doctor indicated that Ms. Niegisch had a ten percent whole body functional impairment due to her cervical spine and a six percent whole

body functional impairment due to her lumbar spine, which combine for a 15 percent whole body functional impairment. But in his letter to attorney Carlton W. Kennard dated May 5, 1998, the doctor rated the functional impairment for the lumbar spine at only five percent. The discrepancy in those ratings is not explained. But at his first deposition taken in July 1997, the doctor testified that Ms. Niegisch had a six percent functional impairment for her low back.

19. Although he does not explain how the neck was injured in the September 1995 accident, Dr. Smith believes Ms. Niegisch had disc disease in both her low back and neck that was aggravated by that incident. After reviewing the task loss analysis prepared by Jerry Hardin, the doctor adopted it as his analysis of the tasks that Ms. Niegisch lost as a result of the work-related accident. Therefore, the doctor believes that Ms. Niegisch is unable to do 18 of 37, or 49 percent, of the work tasks that she performed in the 15-year period before the accident.

20. Vocational rehabilitation counselor Karen Terrill also prepared a task list and analysis. But Dr. Smith was not asked to review that analysis or provide an opinion of Ms. Niegisch's task loss utilizing Ms. Terrill's task list.

21. Although wavering somewhat on cross-examination, Dr. Amundson testified that Ms. Niegisch's low back injury was related to the September 1995 accident but her neck condition was not. The doctor testified, in part:

If, in fact, she had the onset of the neck pain in September, with that proximity to the fall, then I would say they were related, just as the low back was related.

22. The Board is persuaded by Dr. Amundson's opinions and finds that Ms. Niegisch did not injure or aggravate her neck in the September 1995 accident. As Dr. Amundson testified, if her neck symptoms had begun in September, it would have been much more probable that the accident either aggravated or caused the cervical disc herniations. But the greater weight of the evidence indicates that Ms. Niegisch's neck problems began in earnest in January 1996 when she awoke with a stiff neck and symptoms that progressed as she filled her van with gas and as she readied herself for work.

23. Dr. Smith testified that Ms. Niegisch has a six percent whole body functional impairment as a result of the September 1995 accident and the resulting low back injury. The Board adopts that opinion as its finding. Additionally, he indicated that her preexisting disc disease constituted one-half of that six percent rating. At his second deposition, the doctor stated:

Yes, if the history is that she has had symptomatic back disease, then it would be my judgment that 50 percent of the lumbar assignment would be attributable to the pre-existing problem and 50 percent to the subsequent problem [the September 1995 accident].

As indicated above, Ms. Niegisch had low back symptoms for which she sought treatment as early as 1992. Therefore, the Board finds that Ms. Niegisch had a preexisting impairment and that three percent of the six percent functional impairment rating for the lumbar spine preexisted the September 1995 accident.

24. The Board adopts the Judge's findings as set forth in the Award to the extent they are not inconsistent with the above.

#### **CONCLUSIONS OF LAW**

1. The Award should be modified.
2. Because she injured her back, Ms. Niegisch is entitled to receive the permanent partial general disability benefits that are defined in K.S.A. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk<sup>1</sup> and Copeland.<sup>2</sup> In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988

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<sup>1</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>2</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

3. Because Ms. Niegisch returned to her job at Diamond Coach on a full-time basis, the Board concludes that she returned to work at a wage comparable to what she was earning on the date of accident. Because she left work in January 1996 because of her neck problems, which are unrelated to the September 1995 accident, Ms. Niegisch's loss in ability to earn wages is not related to her work-related injury but to an event unrelated to her work. Therefore, for purposes of the wage loss prong of the permanent partial disability formula, the Board must impute a comparable wage for that period after Ms. Niegisch left work.

4. Because she is treated as earning 90 percent or more of her average weekly wage on the date of accident, Ms. Niegisch's permanent partial general disability is limited to her functional impairment rating.

5. The Workers Compensation Act provides that all awards of compensation shall be reduced by the amount of preexisting functional impairment.<sup>3</sup> As indicated above, three percent of the six percent functional impairment for the low back injury preexisted the September 1995 accident. Therefore, Ms. Niegisch's permanent partial general disability award is reduced to three percent.

### **AWARD**

**WHEREFORE**, the Appeals Board modifies the February 18, 1999 Award to grant Ms. Niegisch benefits for a three percent permanent partial general disability.

Jeannie Niegisch is granted compensation from Diamond Coach Corporation and its insurance carrier for a September 19, 1995 accident and resulting three percent permanent partial general disability. Based upon a \$255.28 average weekly wage, Ms. Niegisch is entitled to receive 8.39 weeks of temporary total disability benefits at \$170.20 per week, or \$1,427.98, followed by 12.45 weeks of permanent partial general disability benefits at \$170.20 per week, or \$2,118.99, for a total award of \$3,546.97, which is all due and owing less any amounts previously paid.

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<sup>3</sup> K.S.A. 44-501(c).

The Appeals Board adopts the remaining findings set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS  
M. Doug Bell, Coffeyville, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director